(27)

Office - Supreme Court, U. S.
FILED
MAY 29 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Number 969

LOCAL No. 6167
UNITED MINE WORKERS OF AMERICA,
AN UNINCORPORATED ASSOCIATION
AFFILIATED WITH THE INTERNATIONAL
UNION, UNITED MINE WORKERS
OF AMERICA, ET AL.,

Petitioners

Versus

JEWELL RIDGE COAL CORPORATION,
A CORPORATION,

Respondent

BRIEF OF COUNSEL FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Wm. A. Stuart
George Richardson, Jr.
Attorneys for Respondent

SUBJECT INDEX

		Page
I.	JURISDICTION	1
II.	STATEMENT OF THE CASE	2
III.	ARGUMENT	3
1.	The Administrative Ruling	5
2.	The Established Usage Throughout the Industry	5
3.	The Situation in Respect of Collective Bargaining	6
4.	The Conditions and Facts of Underground Travel in Respondent's Mines	10
5.	The Interpretation of the Act	12
IV.	CONCLUSION	13

TABLE OF AUTHORITIES CITED

	Page
Tennessee Coal Iron and Railroad Company v. Muscoda Local No. 123, et al.,——— U. S.———, 88 L. ed. 610	2
Tennessee Coal Iron and Railroad Company v. Muscoda Local No. 123, et al., (C. C. A., 5), 135 F. 2d, 320	4
Tennessee Coal Iron and Railroad Company v. Muscoda Local No. 123, et al. (D.C.,N.D.,) (Ala), 40 F. S. 4	6
Judicial Code, section 240 (a), 28 U. S. C. A., Sec. 347	1
Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A., Section 201	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Number 969

LOCAL No. 6167
UNITED MINE WORKERS OF AMERICA,
AN UNINCORPORATED ASSOCIATION
AFFILIATED WITH THE INTERNATIONAL
UNION, UNITED MINE WORKERS
OF AMERICA, ET AL.,

Petitioners

Versus

JEWELL RIDGE COAL CORPORATION,
A CORPORATION,

Respondent

BRIEF OF COUNSEL FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI FILED HEREIN

I. JURISDICTION

Petitioners appealed this case to the Circuit Court of Appeals, Fourth Circuit, but without awaiting that Court's action, which could have been had at its June term, petitioned this Court to grant certiorari.

That this Court has authority under section 240 (a) of the Judicial Code, 28 U. S. C. A., section 347, to grant the requested writ before the Circuit Court of Appeals has passed upon the case is undeniable. It is equally undeniable that its right to do so has been most sparingly exercised. Here in support of prayer for extraordinary action the importance of the litigation is urged. Respondent would

quickly concede the full measure of importance ascribed to the case, but queries whether that very importance does not argue in favor of allowing the case to follow the usual course in order that this Court, if and when it takes cognizance of the case, will have the benefit not only of the District Court's findings and judgment but as well of a full review by the Circuit Court of Appeals for the Fourth Circuit.

The public interest is cited as warrant for bypassing the Circuit Court of Appeals. Petitioners have fomented such interest among their own large membership and have given such wide currency to the slogan by which they have labeled this litigation that the assertion of public interest cannot be disputed. But pressure of popular clamor is an inappropriate accompaniment for prayer for extraordinary judicial action. And certainly it could be said that the sort of public interest here involved might best be served by requiring this case to follow the orderly and usual course through the Courts. Respondent is unwilling to recognize in the reasons assigned by Petitioners for granting the writ any suggestion that the national supplies of a vital commodity are in any way threatened.

These considerations are addressed to the sound discretion of this Court. Respondent recognizes the right of Petitioners to have the findings and judgment of the District Court in this case reviewed, and stands equally ready to meet the issue in this Court or in the Circuit Court of Appeals, where the case now is.

II. STATEMENT OF THE CASE

In the *Muscoda Case* (*Tennessee Coal Iron & Railroad Company v. Muscoda Local No. 123, etc., et al.*, No. 409, decided March 27, 1944, 88 L.Ed. 610), this Court

held that the underground travel time of iron ore mine workers was properly included within their workweek under the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. A. Sec. 201.

In the present case the question is whether the underground travel time of bituminous coal mine workers *must*, by force of the Act, be included in the workweek—whether there *must* be a change from the traditional 'face-to-face' basis of pay, under which a man has been understood to be at work as soon as he got to his usual working place and his pay started then and continued until he finished his shift at his assigned place, to the 'portal-to-portal' basis, under which a man is regarded as being at work and his pay starts when he enters the portal of the mine and continues, less an agreed period for lunch, until he leaves the mines without regard to the time spent at his usual working place.

III. ARGUMENT

In their "Summary and Short Statement of the Matters Involved," petitioners have accurately stated the formal issues and how they were developed and decided. But in their "Statement as to Operations of the Mines" they have failed to portray fairly the factual setting for those issues. They say that there is no dispute in the evidence as to a single essential feature of the mining operations, and yet their statement as to operations is in striking contrast with the description of the same operations contained in the District Court's findings. The Court listened to a parade of witnesses who, in giving bit by bit a picture of these mine operations, differed as diametrically as the positions now before this Court. The District Judge had to evaluate all of that evidence, and, according to the credibility of the witnesses, the reasonableness of the testimony and soundness of the explanations, decide the issues presented. It is

obvious that in doing so he had to draw upon all those tests, those powers of perception and judgment, which dictate the strong presumption in favor of the findings by that Court who has seen the witnesses and heard their testimony.

In their statement, as in the trial, petitioners have attempted to make the tail wag the dog in this, that, whereas the real issue is whether the time spent in riding or walking to their working places in the mines *must*, by force of the Act, be included in the employee's workweek, they on the other hand have placed disproportionate emphasis upon the few minutes spent by certain of the employees in pre-portal activity. The most of the men "don't have anything to do" before entering the mine (R. 515), "just a few of the Company men" (R. 516). They are under no supervision (R. 505, 516), and the things those men do consume on an average from three to ten minutes (R. 506, 546). The trial Court, following the Circuit Court of Appeals for the Fifth Circuit in the *Muscoda Case*, 135 F. 2d. 320, found that these activities, which occur before the employee reports for work (R. p. 218), "fall within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment" (R. p. 563).

Petitioners state the facts of the present case as nearly as possible in line with those of the *Muscoda Case*, setting out points of similarity and ignoring points of difference, and then summarize the result under the heading "Decision of the District Judge" (petition, p. 12) as follows:

> "The District Judge did not make any finding of facts contrary to the facts above enumerated."

This statement is considerably less than fair. The District Court considered the facts found in the *Muscoda Case*, and

found that they were not only different from, but were the exact converse of, the corresponding facts in the present case on the four cardinal points (R. pp. 565-7):

1. The administrative ruling,
2. The established usage throughout the industry,
3. The situation in respect of collective bargaining,
4. The conditions and facts of underground travel in respondent's mines.

We here set out the distinctions.

1. The Administrative Ruling.

In the *Muscoda Case* the Administrator of the Wage and Hour Division, charged with the enforcement of the Fair Labor Standards Act, had issued an official ruling that the portal-to-portal basis was applicable in the iron ore mines, and he intervened as a party, presented evidence, filed briefs and made arguments in the case in support of that position. In the present case, he had issued an official ruling and decision to the precise contrary, fully upholding the 'face-to-face' basis as against the 'portal-to-portal' basis, and did not intervene in the case, though he kept in touch with the proceedings by having his attorney present informally at all stages of the case, as stated by the Court (R. p. 559). Petitioners ignore the administrative ruling.

2. The Established Usage Throughout the Industry.

The facts found in the *Muscoda Case* were that while plaintiff in that case contended

> "that the custom has always and universally been such as to exclude any payment for the time spent by

underground iron ore employees in walking and being transported to and from their usual working places***** The evidence has disclosed no such custom." *Muscoda Case,* D. C., 40 F. S. 4, 7.

In the present case the Court found that

"the evidence shows beyond question that, in the bituminous coal industry in this country, for the past fifty years, travel time of underground workers has not been considered work time. By the NIRA Code for the bituminous coal industry, travel time was definitely excluded from work time. By the precise terms of all subsequent contracts between plaintiff and defendants, and between employers and employees generally in the bituminous coal industry, travel time has been excluded from work time." (R. p. 569).

3. The Situation In Respect Of Collective Bargaining.

In the *Muscoda Case* the Court found that

"the methods of payment of wages were dictated almost entirely by the employers. The employees worked on the best terms they could obtain . . . It cannot be said that the way in which the iron ore miners have received their pay established, with their free and uncoerced agreement, the proposition that the time in question is not worktime." 40 F. S. 4, 8.

In the present case the Court found that

"here, we have the word of both the operators and the Union, that as to the 'face-to-face' basis, 'this method of measuring the worktime at the place of work. . . is the result of collective bargaining in its complete sense'" (R. p. 566)

and that

"the record in this case by no means discloses 'a pitiable picture of helplessness against the domination

> of the mining companies'; on the contrary, the record here does disclose the picture of the 'strong and powerful' union. . . (R. p. 567).

Summarizing the results of fifty years of usage and collective bargaining, petitioner United Mine Workers of America, united in a letter (known as the "Houck letter") under date of July 9, 1940, to the Wage and Hour Division stressing the serious effects upon the bituminous coal mining industry which would result if the Act were construed to require a change from the 'face to face' basis to the portal-to-portal basis, in which the following statements were made (R. pp. 667-671):

> "The Appalachian Wage Agreement is the basic agreement for the bituminous mines in the State of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Maryland."
>
> . . . . . .
>
> The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. . . . . .
>
> "There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. . . . . .
>
> "Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by

the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898. . . . . .

(If the Division should rule that the Act requires a change to the "portal-to-portal" basis), "collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. . . . . .

"For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of Interpretive Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act.' "

Confirming the statements of the "Houck letter" as to the effects to be anticipated from the impostion of a rigid portal-to-portal basis on the long-range future of the industry, as distinct from temporary non-competitive wartime conditions, O'Neill, a distinguished figure in the industry, testified as follows (R. pp. 144-5):

"This condition that we are getting into here now is going to change the relationship between mines, between districts, and the whole competitive situation that we have had in this industry for fifty years is being revolutionized by this thing called portal-to-portal pay, and it is being done, in my opinion, without consideration of its consequences at all, or perhaps, may I say with a recklessness that shouldn't be in an industry like this at a time like this. I think

that every statement contained in the (Houck) letter will be proven to be correct, under that War Labor Board's decision, in a very short time. I think the industry and the United Mine Workers will, as competitive conditions return, have to back away from this portal-to-portal thing in order to insure the maintenance of competition between operators and to insure maintenance of work for their own people."

The face-to-face basis for measuring working time has been fixed immemorially by "custom, tradition and contract provision" (R. p. 670) in the industry.

The District Court found that petitioner's present contention that the Act requires a change to the portal-to-portal basis was not advanced until petitioner's efforts to obtain a wage increase in 1943 on some other basis had been prevented by the national wage stabilization regulations. The Court said: (R. pp. 552-3):

"The United Mine Workers Union has never in any way contended that travel time was work time under the Fair Labor Standards Act until the Wage Conference of March, 1943, and only contended for it then as an additional basis for its demand for a general wage increase to all mine workers, both inside and outside the mines.

. . . . . .

"Thus, the 1943 demand of the Union is actually a demand for a flat wage increase to all mine workers, whether or not they spend any time traveling underground to their usual places of work, and not truly a contention that the Fair Labor Standards Act requires inclusion of the actual travel time as work time for those who have actual travel time underground."

The petitioners ignore the collective bargaining history,

the Houck letter, and the circumstances which evoked the Union's present contention for the portal-to-portal basis.

4. The Conditions and Facts Of Underground Travel in Respondent's Mines.

This Court has summarized findings 15 to 27 of the District Court in the *Muscoda Case* dealing with the facts and conditions of underground travel in the iron ore mines, saying:

> "The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves continous physical and mental exertion as well as hazards to life and limb. And this compulsory travel occurs entirely on petitioners' property and is at all times under their strict control and supervision."

The District Court in the present case summarized the difference between the findings in the *Muscoda Case* and what the evidence showed in the present case with regard to the facts and conditions of underground travel in the respective mines involved as follows (R. p. 567):

> "Fourth, there the court found that the underground travel was under conditions peculiar to the mining of iron ore which were replete with hazards, highly uncomfortable and requiring physical exertion, due largely to over-crowding of cars and which were unpleasant and disagreeable because of bad odors, heat and poor ventilation, and were burdensome to those encountering them. Here, although I have not found that the 'mantrips' constituted pleasure excursions, I have found no such painful and burdensome conditions as those described in the iron ore mines."

The District Court also found (R. pp. 546-7):

> "Transportation for employees by mantrips is necessary for the successful operation of the mines. They constitute a benefit to both employer and employees. They benefit the company in promoting safety, orderliness and increased productiveness: they benefit the employees by saving their time and energy, and thus increase their productiveness. . . .
>
> "No work or labor is required of employees while riding on mantrips, and supervision is limited to the enforcement of safety rules and regulations. Those riding on mantrips sit upright where the roof is high enough, but find it necessary to bend over where the roof is low. Riding on mantrips, while definitely not luxurious, is neither painful nor unduly uncomfortable, and is less hazardous than other phases of mining operation."

With regard to supervision, the employees are subject to no more supervision or requirements on mantrips than they are during the lunch period (R. p. 241).

It is to be noted that the "Safety Rules and Regulations" which are enforced on mantrips are those promulgated by the public authorities, and in enforcing them the foreman in charge of the mantrip discharges a function corresponding to that of a conductor on a railway passenger train (R. p. 226).

Petitioners exaggerate the hazards of the mantrips. The serious accidents mentioned in the petition (p. 11) did not occur on mantrips, but during work (R. pp. 482, 526). Since January 1, 1939, respondent has operated 12,115 mantrips (i. e. trains of cars transporting employees to or from work) per compensable accident.

5. The Interpretation of the Act.

The District Court reviewed the legislative history of the Act and found therefrom as a fact that (R. p. 558):

> "It was neither the intent of Congress nor the desire of the Union, in the enactment of the Fair Labor Standards Act of 1938, to interfere in any way with the wage structure of the bituminous coal industry."

The position taken by petitioner United Mine Workers of America before the congressional committees at the hearings preceding the enactment, as stated and endorsed in the present case by the important Union official and witness Tetlow, was quoted by the Court as follows (R. p. 558):

> ". . . . the miners' organization has always taken the position that the question of wages, hours and conditions of employment should be governed and controlled by agreements under collective bargaining in the industry more so than by legislation. Fundamentally, we are opposed to legislation that controls daily wage and conditions of employment. We think that is a relationship that should exist between employer and employee."

Obviously, the question whether bituminous coal miners should be paid on the basis of face-to-face or portal-to-portal had, prior to the Act, resided wholly in the field of collective bargaining. The District Court, in the present case, had before him the duty of determining whether Congress by the Act had removed that question from the field of contract to that of status, thus reversing Maine's famous dictum. The Court, after employing the aids to construction presented by the record, concluded that it was the intention of Congress to leave the issue as between face-to-

face and portal-to-portal in the field of contract, where it had found it. This conclusion is supported by the administrative ruling, the familiar and established usage in the industry to which all parties continued to adhere without demur after the enactment, the common agreement of the parties expressed in the long history of collective bargaining, the legislative history of the Act, and the facts of underground travel in respondent's mines.

This Court said in the *Muscoda Case*:

> "In the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as these words are commonly used. . . . . ."

It cannot be gainsaid that "as these words are commonly used" in the bituminous coal mining industry they have not included the time used in travel to and from the usual working places of the respective employees. Nor can it be said that the evidence in this case shows any such requirements of physical or mental effort on the part of the underground workers before they arrive at their accustomed working places as to make clearly wrong the finding of the District Court that they were not at work during the travel time.

IV. CONCLUSION

It therefore follows that the findings and judgment of the District Court should stand and this petition be denied.

Respectfully submitted,

WM. A. STUART,
Abingdon, Virginia,
GEORGE RICHARDSON, JR.,
Bluefield, West Virginia,
Counsel for Respondent.